

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

AUG 10 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0043-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
PABLO MORENO GONZALES,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-41289

Honorable Charles S. Sabalos, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hooker, Pima County Public Defender
By Frank P. Leto

Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Pablo Gonzales was charged with kidnapping and sexual abuse of a minor under the age of fourteen years. Pursuant to a plea agreement, Gonzales pled no contest to kidnapping. The trial court sentenced him to a presumptive, seven-year prison term, which Gonzales completed in 1997. Pending his release from prison in Texas on unrelated charges, Gonzales filed a petition for post-conviction relief in Pima County Superior Court, alleging the Department of Corrections was requiring him to register as a sex offender in Arizona in violation of his constitutional rights to due process and equal protection. The trial court ruled it had no jurisdiction to address the issue and denied Gonzales’s petition. Because Gonzales has not shown the trial court abused its discretion in reaching its conclusion, we grant the petition for review, but deny relief.

¶2 We will not disturb a trial court’s ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Razo*, 195 Ariz. 393, ¶ 1, 988 P.2d 1119, 1119 (App. 1999). Gonzales has raised a nontrivial issue about the constitutionality of A.R.S. § 13-3821, the sex offender registration statute, as applied to his conviction for kidnapping—an offense nonsexual on its face. But he has not shown us that the trial court erred when it found his claim was not cognizable under Rule 32, Ariz. R. Crim. P., 17 A.R.S.

¶3 Rule 32.1 “list[s] the types of claims over which a court has jurisdiction in post-conviction proceedings.” *State v. Mata*, 185 Ariz. 319, 332, 916 P.2d 1035, 1048 (1996). They are as follows:

- a. The conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona;

b. The court was without jurisdiction to render judgment or to impose sentence;

c. The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

d. The person is being held in custody after the sentence imposed has expired;

e. Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. . . .

f. The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part; or

g. There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence; or

h. The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.

Ariz. R. Crim. P. 32.1. In his petition for review, Gonzales briefly suggests he seeks relief pursuant to subsections (a), (c), and (f), but does not explain how his claim, which challenges a collateral consequence of his conviction that was not imposed by the court at sentencing, would be cognizable under Rule 32. That rule requires that any claims for relief

directly involve his conviction and/or his sentence.¹ And, although Gonzales generally contends that because our supreme court adopted Rule 32 in order to “consolidate[] five former post-conviction remedies into one comprehensive remedy,” and therefore, any claim involving a criminal case in Arizona should be brought under that rule, he does not explain which former remedy this claim would fall under.

¶4 Accordingly, Gonzales has not met his burden to persuade us the trial court erred in denying his petition on the ground it did not have jurisdiction under Rule 32. *See State v. Manning*, 143 Ariz. 139, 141, 692 P.2d 318, 320 (App. 1984) (challenge to parole revocation not within enumerated grounds in Rule 32.1; therefore, no jurisdiction to rule on merits); *State v. Salazar*, 122 Ariz. 404, 406, 595 P.2d 196, 198 (App. 1979) (finding petitioner had not “brought himself within the permissible grounds of Rule 32.1” with claims not explicitly set forth in rule), *overruled on other grounds by State v. Pope*, 130 Ariz. 253, 635 P.2d 846 (1981); *State v. Zebrowski*, 24 Ariz. App. 452, 453, 539 P.2d 926, 927 (App. 1975) (finding trial court had no jurisdiction to address issue not cognizable under Rule 32, noting petitioner has burden to “assert grounds which bring him under the rule”); *see also State v. Carriger*, 143 Ariz. 142, 145, 692 P.2d 991, 994 (1984) (noting that kind of issues brought under Rule 32 are “limited by court rule”).

¹To the extent a few provisions only indirectly apply to claims not involving a defendant’s conviction and/or sentence, Gonzales has not persuaded us any apply to this claim. *See, e.g.*, Ariz. R. Crim. P. 32.1(f), 17 A.R.S. (providing ground for relief when petitioner’s failure to file petition or notice of appeal in timely fashion not his or her fault).

¶5 Gonzales contends that even if we agree with the trial court his claim is not appropriate for post-conviction relief under Rule 32, we should treat his post-conviction petition as a complaint for special action. But, were we to do so, the question presented would be whether the trial court's determination was arbitrary and capricious or an abuse of discretion. *See* Ariz. R. P. Spec. Actions 3(c), 17B A.R.S. For the reasons already discussed, Gonzales has not shown the trial court abused its discretion in finding it did not have jurisdiction to address his claim under Rule 32.

¶6 Accordingly, we grant the petition for review, but deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge